Perkins Coie

607 Fourteenth Street N.W.
Washington, D.C. 20005-2011
PHONE: 202.628.6600
FAX: 202.434.1690
www.perkinscoie.com

Brian G. Svoboda
PHONE: (202) 434-1654
FAX: (202) 434-1690
EMAIL: BSvoboda@perkinscoie.com

December 21, 2006

The Honorable Robert D. Lenhard
Chairman
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

RE: MUR 5842
Majority Action

Dear Chairman Lenhard:

I write on behalf of Majority Action,[1] the Respondent in the above-referenced matter. Filed by Democracy 21 and the Campaign Legal Center, this Complaint presents no violation of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.* (2006) (the "FECA" or "Act"), by Respondent. Premised on legal errors, it is a petition for rulemaking in disguise, by which Complainants Democracy 21 and the Campaign Legal Center ask the Commission to rewrite the definition of "political committee" and to do away with the "express advocacy" standard, as they have tried unsuccessfully so many times before. The Commission should dismiss the Complaint immediately and take no further action.

[1] The Commission's November 1, 2006, letter indicates that both Majority Action "and its treasurer" are Respondents. Majority Action has no "treasurer" as that term is defined and used by the Act, and no individual treasurer was named by the Commission as a Respondent.

FACTUAL DISCUSSION

Majority Action is an unincorporated association, operating under the laws of the Commonwealth of Virginia. It is taxed as a political organization under section 527 of the Internal Revenue Code ("IRC"); its stated purpose, as recorded on its Internal Revenue Service ("IRS") Form 8871, is: "To educate the public on political issues of national importance and to conduct other activities consistent with the status of a political organization under 26 USC 527."

It chose to be taxed under section 527, instead of section 501(c), so that it could speak freely without regard to the restrictions that the IRS places on the speech of section 501(c) organizations. *See, e.g.*, Definition of Political Committee, 66 Fed. Reg. 13,681, 13,687 (Mar. 7, 2001) (noting a wide range of activities captured by the IRS definition of "exempt function," and yet not regulated by the Commission). Choosing section 527 status was the most prudent and sensible course for the organization to take under federal tax law, regardless of any considerations related to federal elections.

Majority Action filed its Notice of Section 527 Status with the IRS on July 13, 2005. Since that time, it has filed regular reports with the IRS, disclosing the identities of all contributors who have given an aggregate of $200 or more in a calendar year. It has also disclosed the amount, date and purpose of all expenditures made to persons aggregating $500 or more in a calendar year. Those reports are available to the general public through the IRS's website.

Majority Action was formed to educate the American public regarding the voting records of the then-Republican Congress, and to promote progressive and Democratic legislative issues. In the year 2006, Majority Action focused on 10-15 key Republican Members of Congress, who served as vehicles to contrast Republican policies and positions with the progressive, Democratic positions favored by Majority Action.

Majority Action organizes itself to avoid making "contributions" or "expenditures" under the Act. It avoids express advocacy of federal candidates' election or defeat. In its written solicitations, it tells donors expressly that their funds will not be used to support the election or defeat of clearly identified federal candidates. It does not coordinate its activities with candidates or political party committees, nor does it make direct contributions to any federal political committees.

ARGUMENT

I. Majority Action Is Not a 'Political Committee'

The Act defines a "political committee" as a group of persons which receives contributions or makes expenditures aggregating more than $1,000 in a calendar year. *See* 2 U.S.C. § 431(4)(A) (2006).[2] Thus, one must receive "contributions" or make "expenditures" to become a political committee. *See id.*

These terms are linked to express advocacy. As the Supreme Court held in *Buckley v. Valeo*, 424 U.S. 1 (1976), vagueness concerns require the definition of "expenditure" to apply only "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat; 'reject,'" *Id.* at 44 n.52. The United States Court of Appeals for the Second Circuit applied this same logic to the definition of "contribution," relying on *Buckley* to conclude that the Act's disclaimer requirements apply only to "solicitations of contributions that are earmarked for activities or 'communications that *expressly advocate* the election or defeat of a clearly identified candidate.'" *Fed. Election Comm'n v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) (quoting *Buckley*, 424 U.S. at 80) (emphasis added).

Without express advocacy, only coordination can potentially turn a payment into an expenditure. *See* 2 U.S.C. § 441a(a)(7). Here, too, however, the Act and Commission regulations place clear limits on the universe of payments that may be transformed into "contributions" by coordination. *See, e.g.*, 2 U.S.C. § 441a(a)(7)(C) (treating payments for "electioneering communications" as contributions where coordinated with candidates or parties). *See also* 11 C.F.R. Part 109 (2006) (prescribing specific coordination rules for public communications).

Thus, political committee status requires either: (1) express advocacy, *see* 424 U.S. at 44 n.52; (2) a payment earmarked for express advocacy, *see* 65 F.3d at 295; or (3) potentially, in some limited circumstances, coordination. Majority Action is not a political committee. It engaged in no express advocacy, for reasons discussed more fully

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[2] The definition extends also to separate funds and to local party committees, but at different thresholds. *See* 2 U.S.C. § 431(4)(B), (C). The Complaint does not allege that Majority Action falls into either of these categories.

below. It received no payments earmarked for express advocacy.[3] It engaged in no coordination with candidates or parties.

The Complaint's core allegation of political committee status fails as a matter of law. It presents the law not as it is, but as the Complainants would like it to be. It fails to meet the basic requirement of a valid complaint. *See* 11 C.F.R. § 111.4(d)(3) (requiring complaints to contain a recitation of facts describing a violation of statute or regulation).

II. The Complaint Asks the Commission to Eliminate Illegally the Express Advocacy Test, or Alternatively to Misread It

The sufficiency of the Complaint depends entirely on a misreading of the express advocacy standard. To proceed on the Complaint, the Commission must accept Complainants' assertion "that "the 'express advocacy' test . . . is not relevant to the question of whether a section 527 organization is making expenditures to influence the election of federal candidates." Compl. ¶ 59. This is because the Complaint makes no credible allegation of express advocacy, a restricted solicitation under 11 C.F.R. § 100.57, or coordination.

Yet Complainants' assertion is wrong. They misconstrue both court and Commission precedent when they claim that the definitions of "contribution" and "expenditure" are no longer linked to express advocacy. In *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), the Supreme Court did not do away with the "express advocacy" standard for determining political committee status. Rather, *McConnell* and later cases show that the express advocacy standard remains a necessary limiting tool. Indeed, the Commission still uses it as its lodestar when wrestling with the fundamental question that gave rise to it in the first place, in *Buckley* – giving the public fair notice of that conduct which is regulated by law.

While the Court in *McConnell* said that the express advocacy standard was not constitutionally compelled, it indicated that the test nonetheless remained a necessary tool of statutory construction, saving what would otherwise be an unconstitutionally vague or overbroad definition of "expenditure." *See McConnell*, 540 U.S. at 190-92. The term

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[3] The Complaint does not allege that Majority Action made any communications indicating "that any portion of the funds received will be used to support or oppose the election of a clearly identified federal candidate." 11 C.F.R. 100.57(a)(2006). *See also* Conciliation Agreements, MURs 5753, 5754, 5511 and 5525 (citing *Survival Education Fund*, 65 F.3d at 295). It presents no facts to suggest that any such solicitation would have occurred, but for its erroneous belief that the group's issue advocacy communications were express advocacy.

remains vague, just as it was in 1976 when *Buckley* was decided. The express advocacy standard is still needed to limit its application, just as it was in 1976.

This is why courts have continued to rely on the express advocacy standard when evaluating state campaign finance laws, even after *McConnell*. In *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), the Sixth Circuit used it to narrow a state statute, one that prohibited the displaying of signs and the distribution of campaign literature within 500 feet of a polling place. *See* 356 F.3d at 656. Concluding that the statute was impermissibly vague when read literally, the court applied the "express advocacy" standard as a limiting construction, reading it to apply only to "speech which expressly advocates the election or defeat of a clearly identified candidate or ballot measure." *Id.* at 665.

The Fifth Circuit faced a similar issue, and used the standard in a similar way, in *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006). The *Carmouche* court applied the "express advocacy" standard to limit a reporting provision of Louisiana's campaign finance law. The court explained that *McConnell* did not do away with the "express advocacy" standard, saying:

> The flaw in [Louisiana's law] is that it might be read to cover issue advocacy (emphasis added). Following *McConnell*, that uncertainty presents a problem not because regulating such communications is *per se* unconstitutional, but because it renders the scope of the statute uncertain. To cure that vagueness, and receiving no instruction from *McConnell* to do otherwise, we apply *Buckley's* limiting principle to the [law] and conclude that the statute reaches only communications that expressly advocate the election or defeat of a clearly identified candidate.

Id. at 665.

Even the Commission has continued to apply the express advocacy standard in its own enforcement actions after *McConnell*. For example, in MUR 5634, the Commission used it to conclude that a Sierra Club pamphlet violated the Act's ban on the use of corporate funds in connection with federal elections. *See* Conciliation Agreement, MUR 5634. The Commission affirmed the standard's "continued validity . . . as a narrowing

construction to cure an otherwise vague or overbroad statute ..." *See* General Counsel's Report #2, MUR 5634 (July 3, 2006), at 11 n.5.[4]

If the express advocacy standard remains the law, as the courts and Commission have said, then this Complaint presents no potential violation. None of the communications sponsored by Majority Action and described by the Complaint comes anywhere close to express advocacy. None refers to voting; all refer only to policy positions and official actions taken by Members of Congress. *See* Compl. ¶¶ 36-47; *cf.* MURs 5511 and 5525. The ads sponsored on stem cell research, for example, are the epitome of issue advocacy. *See, e.g.,* Compl. Ex. T; *see also* http://www.youtube.com/watch?v=q4tFk9WLjwM. "Reasonable minds" could clearly find that they encouraged "some other kind of action" than voting. 11 C.F.R. § 100.22(b)(2).

One particular example shows just how illiberal a position the Complainants urge on the Commission, and how slipshod this Complaint really is. The Complaint correctly alleges that Majority Action sponsored radio ads that referred to House Speaker Dennis Hastert. *See* Compl. ¶ 42. The body of the Complaint, however, does not mention that the radio advertisement ran in the *Washington, D.C.* media market. A Commissioner would have to make it to the next-to-last exhibit in the voluminous complaint, and read it very carefully, to discover this fact. *See* Compl. Ex. T. Not a single one of Congressman Hastert's prospective voters in Illinois would have ever heard this advertisement over the local airwaves.

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[4] The *Sierra Club* MUR shows also that the second prong of the Commission's express advocacy definition, found at 11 C.F.R. § 100.22(b), will not carry the weight that Complainants place on it here. *See* Compl. ¶ 62. At issue in MUR 5634 were multiple communications sponsored by the Sierra Club in 2004 that referred to John Kerry and to President Bush. The only one on which the Commission found probable cause and sought conciliation, however, contained express references to voting: "Let Your Vote Be Your Voice." *See* General Counsel's Report #2, MUR 5634, at 1; Conciliation Agreement, MUR 5634. The Complaint identified other mailings that promoted Kerry and attacked Bush, yet the Commission took no action against them. *See* Complaint, MUR 5634.

Also, when it reviewed the Commission's 2002 coordination rules, the United States Court of Appeals for the District of Columbia Circuit – apparently at Complainants' urging – suggested that the express advocacy standard is far narrower than Complainants now contend: "Yet so long as the supporter neither recycles campaign materials nor employs the 'magic words' of express advocacy-'vote for,' 'vote against,' 'elect,' and so forth-the ads won't qualify as contributions subject to FECA. Ads stating 'Congressman X voted 85 times to lower your taxes' or 'tell candidate Y your family can't pay the government more' are just fine." *Shays v. Federal Election Comm'n*, 414 F.3d 76, 98 (D.C. Cir. 2005).

III. The Complaint Asks the Commission to Rewrite Illegally the Test for Political Committee Status

The Complaint does not simply urge the Commission to scrap illegally the express advocacy standard. It asks the Commission to rewrite illegally the test for "political committee" status. Under the Complaint's illogic, if a 527 pays for a communication that promotes, supports, attacks or opposes a candidate, then it has made an "expenditure," because its "major purpose" is to influence elections. *See* Compl. ¶ 59.

The argument is wrong, for three reasons:

First, the Complaint misstates the so-called "major purpose" test. It is not the first prong of a two-prong test for political committee status. *See* Compl. ¶¶ 53-54. Rather, it is a judicial construct that spares some organizations from political committee registration and reporting, even though they have raised or spent more than $1,000 on express advocacy. *See Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986); *Buckley*, 424 U.S. at 78-79; *Fed. Election Comm'n v. GOPAC, Inc.*, 917 F.Supp. 851, 859 (D.D.C. 1996). Through a neat sleight of hand, Complainants have taken a doctrine that is supposed to *protect* organizations from the burdens of political committee registration and reporting, and twists it into the principal basis for deciding that they are, in fact, political committees. *See* Compl. ¶¶ 53-57.

Second, the Complaint mistakenly equates "political committee" status under the FECA with "political organization" status under the Internal Revenue Code ("IRC"). It cites three advisory opinions from the 1990s to argue that the Commission sees the standard for Section 527 status as "identical to the 'major purpose' prong of the test for 'political committee' status." Compl. ¶ 56 (citing Advisory Opinions 1996-13, 1996-3 and 1995-11). But it ignores later, contrary Commission statements. For example, in 2001, the Commission noted that the IRC "definition is on its face substantially broader than the FECA definition of 'political committee.'" Definition of Political Committee, 66 Fed. Reg. at 13,687. It said also that the IRS had found that "activities such as circulating voting records, voter guides and 'issue advocacy' communications – those that do not expressly advocate the election or defeat of a clearly identified candidate – fall within the 'exempt function' category under I.R.C. Section 527(E)(2)." *Id.*

Complainants themselves have asked the Commission to equate Section 527 tax status with FECA political organization status, to no avail. In 2004, the Commission proposed to rewrite the definition of "political committee," offering two alternatives by which all or

nearly all "527 organizations would be considered to have the nomination or election of candidates as a major purpose . . . ." Political Committee Status, 69 Fed. Reg. 11,736, 11,748 (Mar. 11, 2004). The Complainants urged adoption of the first of these alternatives. *See* Letter from Trevor Potter, Campaign Legal Center, to Ms. Mai T. Dinh, Acting Assistant General Counsel, at 21-23 (Apr. 5, 2004).

The Commission rejected Complainants' position. *See* Political Committee Status, 69 Fed. Reg. 68,056, 68,065 (Nov. 23, 2004). It concluded "that incorporating a 'major purpose' test into the definition of 'political committee' may be inadvisable. . . . [N]o change through regulation of the definition of 'political committee' is mandated by BCRA or the Supreme Court's decision in *McConnell*. The 'major purpose' test is a judicial construct that limits the reach of the statutory triggers in FECA for political committee status." *Id.*

Finally, the Complaint's legal argument is at odds with Congressional intent. Three times, Congress passed legislation, knowing that 527 groups would sponsor communications criticizing federal candidates without becoming political committees. *See* 69 Fed. Reg. at 68,065. It chose to regulate these communications narrowly: first by imposing limited reporting requirements on 527s in 2000, and then by amending those requirements in 2002. It continued this path of narrow regulation in BCRA. It created a special category called "electioneering communications," limited that category by time frame and type of media, and imposed abbreviated limits, source restrictions and reporting requirements. *See* 2 U.S.C. § 441b(c). Indeed, the law even refers to section 527 organizations specifically. *See* 2 U.S.C. § 441b(c)(2).

The Commission put it neatly in 2004: imposing political committee status automatically on section 527 organizations would entail "a degree of regulation that Congress did not elect to undertake itself when it increased the reporting obligations of 527 groups in 2000 and 2002 and when it substantially transformed campaign finance laws through BCRA." 69 Fed. Reg. at 68,065. The Complainants' real grievance is not with Respondent, nor with the Commission, but rather with the Congress, which they believe did not go far enough. Indeed, this is why they have written legislation to obtain the very result sought through this Complaint. *See, e.g., Shays v. Fed. Election Comm'n*, 424 F. Supp. 2d 100, 106 (D.D.C. 2006) (citing H.R. 513 and S. 271).

Thus, the Complaint's basic premise – that an organization becomes a political committee when it criticizes federal candidates, simply because of its tax status – is false. It depends on a misreading of the "major purpose" test that the Commission has rejected. *See* 69

Fed. Reg. at 68,065. It assumes a false equivalency between "political organization" status under the IRC and "political committee" status under the FECA that the Commission has also rejected. *See* 66 Fed. Reg. at 13,687. Finally, it ignores that Congress chose different and more narrowly tailored means to regulate the activities of unregistered 527s. *See* 2 U.S.C. 441b(c)(2). The Complaint provides no legal basis to conclude that Majority Action is a political committee, just because it is a 527 that criticized Members of Congress.

IV. For the Commission to Proceed with an Investigation on the Basis of This Complaint Would Be Arbitrary, Capricious and Contrary to Law

The Commission recently told a federal district court that it has been determining whether 527 organizations are political committees on a "case-by-case" basis. *See Shays*, 424 F. Supp. 2d at 113. Whatever the merits of that approach may have been before 2004, the Commission's 2004 rulemaking on political committee status places serious limits on it now. For the Commission to investigate a 527 organization that attacked a federal candidate in 2005 or 2006, simply because it *was* a 527 organization, would be arbitrary, capricious and contrary to law.

In 2004, the Commission went through an extensive rulemaking to decide when unregistered 527s must be treated as political committees. It rejected equivalency between political organization status under the IRC, and political committee status under the FECA. It refused to incorporate the "major purpose" test into Commission rules. *See* 69 Fed. Reg. at 68,065. It codified what it viewed as the holding of *Survival Education Fund*, providing that a solicitation of funds earmarked for express advocacy could trigger "contributions," and thus political committee status. *See id.* at 68,057.

Thus, the Commission's answer to the question of when an unregistered 527 became a political committee seemed clear. If a group engages in no express advocacy or coordination, makes no direct or in-kind contributions, and solicits no funds under section 100.57, then it is not a political committee. Indeed, on the subject of solicitations, the Commission made a special point of saying that its rules left the organization with "complete control" of its fate. 69 Fed. Reg. at 68,057.

For the Commission to take action against a 527 for post-2004 conduct, simply because of its status, would be arbitrary, capricious and contrary to law. Providing groups with an apparent legal framework to conduct their activities, only to pull the rug out from under them later through the enforcement process, would be inconsistent with the agency's most

basic obligations. The United States District Court for the District of Columbia foresaw this problem when it reviewed the 2004 rulemaking, and ordered the Commission to explain it more fully: "First Amendment or due process concerns might impair [the Commission's] ability to bring enforcement actions in the absence of a regulation providing clear guidance as to when [527s] must register as a political committee." *Shays*, 424 F. Supp. 2d at 115. As the Court observed, 2 U.S.C. § 438(e) shields a person from liability when relying on a Commission rule and acting in good faith in accordance with that rule. *Id.*

These principles do not apply simply to a finding of probable cause, or to the imposition of civil penalties by a federal district court. They limit the commencement of an investigation, which can have hugely disruptive and chilling effects on an organization like Majority Action.

Commission investigations "tread in an area rife with first amendment associational concerns." *Fed. Election Comm'n v. The LaRouche Campaign*, 817 F.2d 233, 234 (2d Cir. 1987). "[M]ere 'official curiosity' will not suffice as the basis for FEC investigation ..." *Fed. Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981). "[T]he highly deferential attitude which the courts usually apply to business related subpoena enforcement requests from agencies whose subject matter jurisdiction is unquestioned, has no place where political activity and association never before subject to bureaucratic scrutiny form the subject matter being investigated." *Id.* at 387.

If the Commission meant what it said in 2004, then it cannot find that a 527 may have broken the law simply by criticizing a federal candidate – just as it cannot find that a corporation may have facilitated the making of contributions simply by hosting a fundraiser through its PAC. In each case, the law permits the conduct and prescribes the limits under which it may be undertaken. That the conduct occurred, standing alone, is no reason to believe that the limits were breached. In the case of the corporation, there must be a credible allegation that the checks were collected in the workplace, for example, or that timely payment by the candidate was not made. In the case of the 527, there must be some credible suggestion of express advocacy, a prohibited solicitation, or coordination.

There is no such suggestion here. The Complaint alleges no express advocacy, no improper solicitation and no coordination. It asks the Commission to investigate the

Respondent because of who they are, not because of what they did. This is an illegal and untenable basis for investigation, which the Commission should reject.

CONCLUSION

For the foregoing reasons, the Commission should dismiss the Complaint as to the Respondent, and take no further action.

Very truly yours,

Brian G. Svoboda
Counsel to Majority Action

cc: Vice Chairman David M. Mason
Commissioner Michael E. Toner
Commissioner Hans A. von Spakovsky
Commissioner Steven T. Walther
Commissioner Ellen L. Weintraub
Lawrence Norton, Esq.